Supreme Court, U.S.
FILED
SEP 24 1991
OFFICE OF THE CLERK

(3)

No. 91-84

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

DEBORAH BELCASTRO-BOWEN, *et al.*,
Petitioners,

v.

DELTA AIR LINES, INC. and
MARILYN WILEY, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITIONERS' REPLY MEMORANDUM

RAYMOND C. FAY
Counsel of Record
THOMAS R. GIBBON
BELL, BOYD & LLOYD
1615 L Street, N.W.
Suite 1200
Washington, D.C. 20036
(202) 466-6300
Counsel for Petitioners

September 1991

6

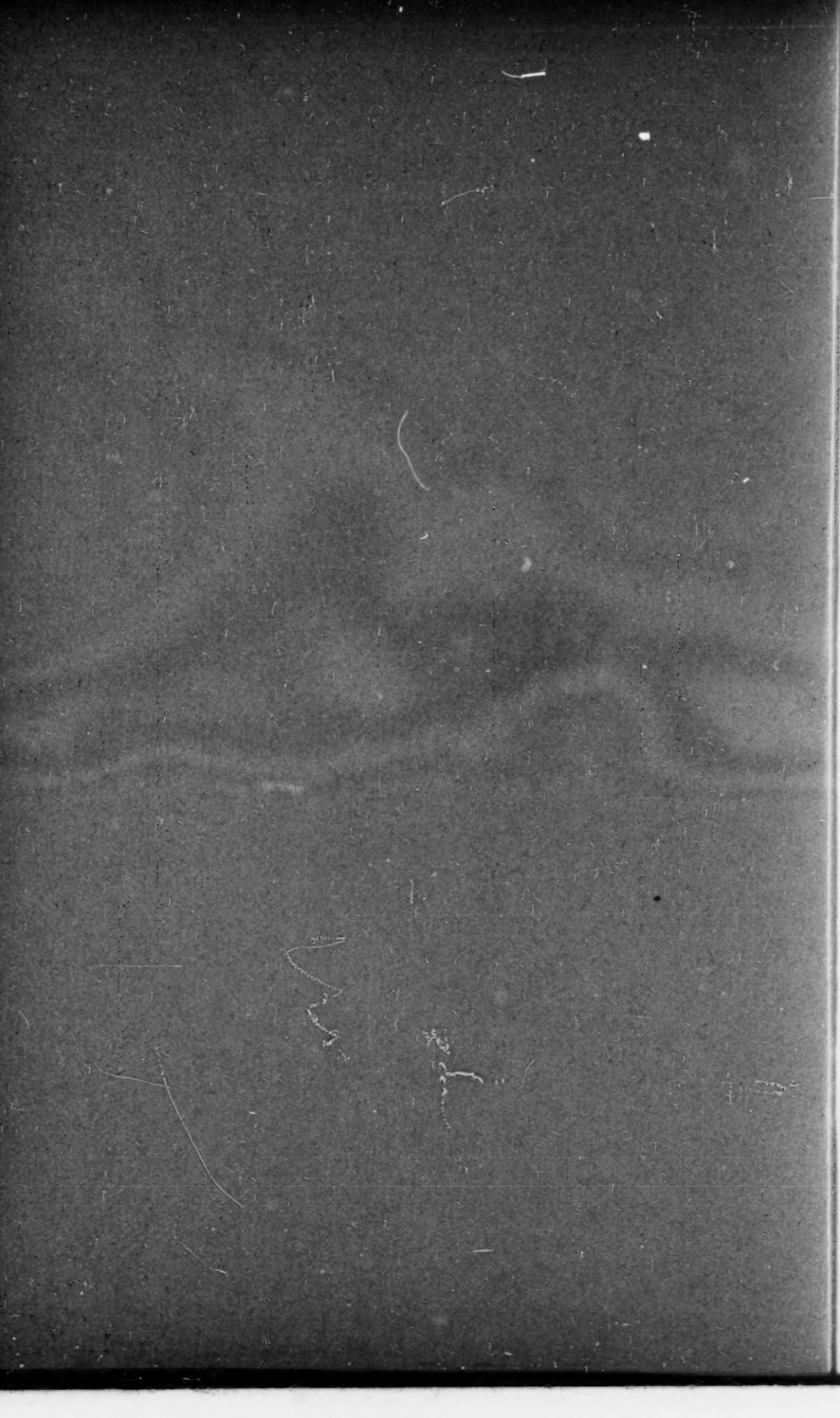

TABLE OF AUTHORITIES

	Page
Cases	
Eaton v. Delta Air Lines, Inc., No. 87-748 (W.D.Wa.)	3, 4
Mandujano v. Basic Vegetable Products, Inc. 541 F.2d 832 (9th Cir. 1976)	4
Wiley v. Delta Air Lines, Inc., No. 87-2273 (N.D.Cal.)	3, 4
Federal Rule	
Fed. R. Civ. P. 23	1

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-84

DEBORAH BELCASTRO-BOWEN, *et al.*,
Petitioners,

v.

DELTA AIR LINES, INC. and
MARILYN WILEY, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

PETITIONERS' REPLY MEMORANDUM

Petitioners seek a writ of certiorari because the Court should decide the important issue of whether class action procedures may be used to sanction unethical settlement agreements. Respondent Delta Air Lines, Inc. ("Delta") largely ignores this issue by misstating it. Contrary to Delta's argument (Delta Opposition at 11), petitioners do not contend that all settlement classes violate Fed. R. Civ. P. 23 or that all class

members must consent to the settlement. The issue raised by petitioners is whether the district court could certify a class only for settlement when the underlying settlement agreement was unethically entered into without the client's consent. If this procedure is permitted, attorneys will be free to negotiate a settlement without a duty to their clients or their class, and then impose it upon both.

To the extent Delta addresses the actual issue raised by petitioners, Delta argues that the issue is not important because 1) the ethical obligation of an attorney not to make agreements without the consent of the clients is not applicable to settlement agreements which are the basis for a settlement class, 2) the attorney involved in the unethical conduct in this case was allegedly not class counsel and affected clients were not class representatives, and 3) there was no unethical conduct because a majority of the clients approved the settlement agreement the attorney had signed.

Delta correctly states (Opposition at 11) that petitioners base their argument on the principle that attorneys have an absolute ethical duty to secure a client's approval before entering into a settlement agreement and without such approval attorneys have no authority to make a settlement agreement. Delta then claims that this principle is not applicable to class action suits. This is the very issue that petitioners seek to have adjudicated by the Court. Delta presents no rationale for why the normal ethical obligations should not apply to settlement agreements which are entered into before a class is certified. Delta does not explain why a client should lose her right to control settlement of a lawsuit just because an attorney violates his ethical obligations and then uses the unethical settlement as a basis for seeking class certification.

Delta argues that the attorney representing the Seattle Eaton plaintiffs was not class counsel and that his clients were not class representatives. The courts below made no finding on this claim. In the papers supporting the motion for class certification, Seattle counsel Mr. Reed referred to himself as "class counsel" and asserted his willingness to fully and fairly represent the class (Clerk's Record 77 at 5). In those same papers, Delta extolled the qualifications of Mr. Reed and stated that Mr. Reed had done an excellent job of representing the interests of his clients and the class (CR 76 at 5). The notice to the class stated that questions should be directed to Mr. Reed and Mr. Rosenfeld, who were listed as attorneys for plaintiffs and the class. The Settlement Agreement was signed by Mr. Reed as attorney for the plaintiffs and the class. Mr. Reed also received attorneys' fees under the Settlement Agreement. Delta is simply wrong where it asserts Mr. Reed was not an attorney for the class.

Delta is also wrong when it asserts that the Seattle Eaton plaintiffs were not class representatives. The Settlement Agreement that was the basis for class certification was an agreement for both the Seattle Eaton case as well as the San Francisco Wiley case. A pre-condition of the Settlement Agreement was that plaintiffs in both cases agree to the settlement. Moreover, Mr. Rosenfeld was attorney for both the Seattle Eaton plaintiffs and the San Francisco Wiley plaintiffs. Mr. Reed's and Mr. Rosenfeld's ethical obligation to secure their clients' approval before entering into a settlement agreement was not removed simply because they made the tactical decision to seek class certification in Wiley rather than Eaton.

Finally, Delta asserts without citation that the district court accepted Mr. Reed's explanation that he had the approval of a majority of the Eaton plaintiffs (Delta Opp. at 6, n.2). The

district court neither accepted nor rejected Mr. Reed's post hoc majority rule explanation. It ignored Mr. Reed's unethical conduct altogether. In any event, there is no factual or legal basis for Mr. Reed's and Delta's majority rule claim because none of the Seattle plaintiffs had agreed to be bound by majority rule (CR 95, Exh. A) and each client must approve a settlement agreement. Mandujano v. Basic Vegetable Products, Inc., 541 F.2d 832, 834-35 (9th Cir. 1976).

For the reasons stated in their petition and this reply, the court should grant the writ of certiorari to prevent the use of settlement classes to impose unethical settlement agreements on an attorney's own clients.

Respectfully submitted,

RAYMOND C. FAY
Counsel of Record
THOMAS R. GIBBON
BELL, BOYD & LLOYD
1615 L Street, N.W., #1200
Washington, D.C. 20036
(202) 466-6300
Counsel for Petitioners